

## COMMON LAW EXPRESS TRUSTS IN FRENCH LAW

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IN recent years a substantial trust business has arisen in France through the activities of several American trust companies having branches or subsidiaries in that country. The trusts are of the type, familiar to the Common Law, in which a settlor by will or deed transfers property to a trustee in trust for one or more beneficiaries. The reference herein to a "Common Law trust" is to one of this character. The settlors and beneficiaries are usually Americans domiciled in Paris or Nice, but the French also are beginning to resort to American trust institutions. Furthermore, French citizens in the United States now are frequently parties to trusts and Americans resident in the United States often include French securities in their trust estates. It will be of utility, therefore, to consider the legal position of such trusts in French law.

At the outset one may say that there is nothing in the law of France to prevent American companies from doing a trust business in that country; in fact, the only institutions in France which are engaged at present in the trust business are British and American. Foreign companies may enjoy corporate personality in France by virtue of the Law of May 30th, 1857 and the Presidential Decree of April 6th, 1882. To be entitled to operate they must file their Articles and By-laws in the Registry of Commerce as required by the Law of March 18th, 1919. There are no special regulations in France governing the activities of trust companies as such; a trust business is considered in part a banking business, inasmuch as a trustee receives securities, collects interest, and conducts other financial transactions. Subject to the usual formalities applicable to foreign companies in general and to banking companies in particular, trust companies can exercise in France all, or practically all, their usual corporate powers. A trust is not regarded in the same way in the law of France, however, as it is in the laws of the American states. Trusts are not *per se* unlawful, but certain trusts may be void or their scope may be limited for one reason or another.<sup>1</sup> It would be a serious

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<sup>1</sup> "The contract of trust, a special institution of the Anglo-Saxon legal system, is not void *in se*, even if it is intended to produce effects in France. One must study, in each instance, whether or not its performance in

error to suppose that trust companies can make Common Law trusts in France with the same freedom, the same safety and with the same standard forms as they can in America; or that they can make trusts in America for French persons as they can for American.

This article will not go into the problem of the circumstances in which French law will be applied to a Common Law trust in America. That is a matter of our law, not of French law, and the American rules for the solution of conflicts of law are still very unsettled. The study will deal only with trusts of the Common Law type in French municipal or internal law and in French private international law. By way of introduction it seems desirable to mention certain principles of French law as set forth in various Articles of the Civil Code.<sup>2</sup>

Ownership of property is defined<sup>3</sup> as the "right to enjoy and dispose of things in the most absolute manner." There is no prohibition of the suspension of the power of alienation of personalty, but there is a provision applicable to all personalty except stolen property that possession equals title.<sup>4</sup> In the case of lost or stolen securities special measures are provided to prevent negotiation through brokers and to facilitate recovery of the specific *res* by the owner.

By another provision<sup>5</sup> donations *inter vivos* and by will are lawful, but donations *mortis causa* are void. Nevertheless there is not complete freedom of donation or of testamentary disposition. The portion available for free disposition is limited to one-half of the owner's property if he has one child, to one-third if he has two, to one-fourth if he has three or a greater number.<sup>6</sup> Donations to be valid must be irrevocable<sup>7</sup> and must be made by notarial instrument unless the thing given is actually delivered.<sup>8</sup> Donations are not binding upon the donor until

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France would violate legal provisions involving public order." Question 187, *Quelle est l'opinion de la jurisprudence française sur l'institution juridique anglo-saxonne des trusts ou fidéi-commis?* (1911) 38 CLUNET 134. (The JOURNAL DU DROIT INTERNATIONAL PRIVÉ will be cited herein as CLUNET).

<sup>2</sup> See CACHARD, THE FRENCH CIVIL CODE (1895).

<sup>3</sup> Art. 544.

<sup>4</sup> Art. 2279.

<sup>5</sup> Art. 893.

<sup>6</sup> Art. 913. See also Art. 915: "Advantages resulting from donations *inter vivos* or from wills cannot exceed one-half of the property if, in case there are no children, the decedent leaves one or more ascendants in each of the paternal and maternal lines, and three-quarters if he leaves ascendants in the one line only."

<sup>7</sup> Art. 944.

<sup>8</sup> Art. 931.

accepted by the donee;<sup>9</sup> those made by a donor who has no children are *ipso facto* revoked by the birth of issue.<sup>10</sup>

A contract dealing with future inheritance is illegal.<sup>11</sup> No French rule exists against perpetuities, but there is a general prohibition of *substitutions*,<sup>12</sup> a term which Cachard translates as "entails." A French *substitution* is a sequence of two ownerships. Thus it would be a *substitution* for property to be conveyed or devised by A to B for B's benefit with a proviso for the property to pass later from B to C for C's benefit. Unless A or his heirs are named as ultimate beneficiaries there will be no reversion. This is not precisely the same as a conveyance of a fee entail, the reversion of the fee being left in the grantor, but the entail and *substitution* bear considerable analogy. An exception to the prohibition of *substitutions* occurs in the allowance of a succession of two ownerships in favor of children,<sup>13</sup> brothers and sisters,<sup>14</sup> and their descendants in the first degree.

Marriage articles governing property rights of the spouses must be drawn up prior to the marriage before a notary,<sup>15</sup> and

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<sup>9</sup> Art. 932: "The donation *inter vivos* shall not be binding upon the donor and shall not produce any effect until the time when it has been accepted in express terms. The acceptance may be made during the lifetime of the donor by a subsequent public instrument, of which the original shall remain (with the notary); but then the donation shall not have any effect with respect to the donor until the time when notice has been given to him of the instrument containing such acceptance."

<sup>10</sup> Art. 960: "All donations *inter vivos* made by persons who had no children or descendants actually living at the time of the donation shall be revoked as a matter of right upon the birth of a legitimate child of the donor, even if posthumous, or in case of the legitimation of a natural child by subsequent marriage, if born since the donation, of whatever value these donations may be and for whatever cause they may have been made, even if they were mutual or remunerative, and even if they were made in view of marriage by persons other than ascendants to the husband or wife, or by the husband or wife to each other."

<sup>11</sup> Art. 791: "One cannot, even by marriage contract, renounce the succession of a person living, or convey prospective rights which one may have to that succession." Art. 1130: ". . . It is not allowed, however, to renounce a succession which has not become open, nor to make any stipulation with respect to such succession, even with the consent of the person whose succession is in question."

<sup>12</sup> Art. 896: "Entails are prohibited. Every provision by which a donee, an heir appointed, or a legatee shall be required to keep property and to return it to a third party shall be void, even as against the donee, the heir appointed or the legatee."

<sup>13</sup> Art. 1048.

<sup>14</sup> Art. 1049: "A provision made by a decedent by an instrument *inter vivos* or by a will, for the benefit of one or several of his brothers or sisters, of all or part of the property composing the succession which is not reserved by law, with obligation to return the same to the children born or which may thereafter be born in the first degree only of the said brothers and sisters who are donees, shall be valid in case the decedent dies without issue."

<sup>15</sup> Art. 1394.

this antenuptial contract cannot be changed during the marriage.<sup>16</sup> The terms of marriage articles cannot modify the legal order of succession to property save to the limited extent allowed for donations or for testamentary disposition.<sup>17</sup> All powers of attorney are made revocable,<sup>18</sup> but this means they are revocable unless coupled with an interest or stipulated to be irrevocable.

By reason of Articles 14 and 15 a French settlor, trustee, or beneficiary can always sue or be sued in France in relation to a trust.<sup>19</sup> A trust is an "obligation" within the meaning of these Articles, and the French courts have jurisdiction thereunder regardless of the manner of service of process, the domicile of the defendant, or the location of the trust *corpus*. A French judgment so obtained may be executed in France against an American trustee who has assets there, *e.g.* shares of a French subsidiary. It does not follow, however, that a default judgment obtained where there was no personal service, rendered in virtue of the exceptional jurisdiction granted by Articles 14 and 15, would be recognized or given full faith and credit in the United States.

French law governs real property situated in the Republic even when owned by foreigners.<sup>20</sup> This is also true of personality located in France considered *ut singuli*. The succession of a Frenchman, wherever domiciled and whatever and wherever the personal estate, is governed by French law. French law determines the capacity of a French settlor, trustee, or beneficiary to make, hold, and receive respectively under a trust or will. French internal law will be applied whenever there is a *Renvoi* from a foreign private international law, for France accepts this doctrine. French law likewise, for reasons of sovereignty, applies in France to questions of taxation of a trust *corpus* and income.

With the foregoing principles in mind, the attitude of French

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<sup>16</sup> Art. 1395.

<sup>17</sup> Art. 1389.

<sup>18</sup> Art. 2004: "A principal can revoke his power of attorney whenever he chooses, and compel the attorney-in-fact, if necessary, to return to him, either the writing under private signature which contains it, or the original of the power in public form, if such original has been delivered, or the certified copy if the original has been kept."

<sup>19</sup> Art. 14: "An alien, even not residing in France, may be summoned before the French Courts for the fulfillment of obligations contracted by him in France towards a French person. He may be called before the French Courts for obligations contracted by him in a foreign country toward French people." Art. 15: "A Frenchman may be called before the French courts for obligations contracted by him in a foreign country, even towards an alien."

<sup>20</sup> Art. 3.

internal law toward trusts may now be considered. Trusts were known in France during the Old Regime under the name *fiducie*. This term is indeed still used in the Province of Quebec, where the Custom of Paris remains the basis of law. "*Fiducia* is the real substitute for a trust; it is its twin institution, since not only are the same functions fulfilled by it, but the same methods are used to achieve them."<sup>21</sup> The institution of *fiducie*, however, became obsolete in France with the Revolution of 1789 when feudal land tenure was abolished. At the present time the results achieved in Common Law countries by private express trusts are only partially attained in France. What is done is accomplished, as will be seen later, principally by the adaptation of such legal institutions as agency (*mandat*), bailment (*dépot*), conditional devises and bequests (*legs à charge*) and usufruct.

In order to understand the attitude of French law toward Common Law trusts it is necessary to describe the law which governs the contract of *prête-nom*. This is the nearest thing to a trust in modern French law, but it is not extensively used. The *P. N.* is simply a person invested with the ostensible title to property for particular purposes, "an agent disguised as an owner."<sup>22</sup> He is a real agent in his relations with his principal, a real owner in his relations with third persons. The agency is not fictitious but the *mandatum* is *sui generis*. The "only difference" in French law between the *P. N.* as an agent and an ordinary agent is that the *P. N.* is liable to third persons, whereas in the ordinary agency relation the principal alone is liable to third persons for what the agent does.<sup>23</sup> This French type of trust is created by two documents: the ostensible title is transferred to the *P. N.* by a notarial or other written instrument; the restrictions are set forth in a separate, usually secret, instrument called the *contre-lettre*. This counter-letter, or defeasance, is not a later novation of the ostensible contract; rather the two instruments form *ab initio* the whole contract so far as principal and agent are concerned. According to the Civil Code, counter letters produce their effect only between the contracting parties.<sup>24</sup> Authority exists that a counter-letter is binding upon third persons who had knowledge thereof, and that the Code provision is intended only to protect against deception.<sup>25</sup> Contrary to this view, however, is a decision of the Court of

<sup>21</sup> Lepaulle, *Civil Law Substitutes for Trusts* (1927) 36 YALE L. J. 1126, 1138.

<sup>22</sup> 4 BAUDRY-LACANTINERIE, PRÉCIS DE DROIT CIVIL (1922) 583.

<sup>23</sup> FISCHBACH, TREUHANDER UND TREHAND GESCHÄFTE (1912) 49.

<sup>24</sup> Art. 1321.

<sup>25</sup> FISCHBACH, *op. cit. supra* note 23, at 85.

Cassation<sup>26</sup> that a counter letter is *res inter allos acta* so far as third persons are concerned and that such third persons may deal with the *P. N.* as owner even though they know the terms of the counter-letter. Whereas a counter-letter cannot be used "against" third persons, the latter may claim the benefit thereof.<sup>27</sup> Thus, a third person who knows of the counter-letter can require the principal to join in an action involving the *P. N.* The employment of the institution of *P. N.* is not unlawful except when made *in fraudem legis aut creditorum*.<sup>28</sup> A law of July 1st, 1901 expressly forbids the use of such an "interposed person" to hold property for the benefit of congregations in order to evade the law on Religious Corporations. French courts, not understanding the complicated Common Law of trusts, show a tendency on occasion to treat Common Law trusts as if they were similar to the French *P. N.* institution, although the difference between the two is substantial.

What now is the relation of a trust to the French law of property? There is no such thing in French law as a division of ownership into legal and equitable, of *domaine ostensible* and *domaine utile*.<sup>29</sup> The nearest thing thereto is a division of ownership into *nue propriété* and *usufruit*, based upon Roman Law. But the title of a trustee is not *nue propriété* since this kind of *propriété* is always alienable without violation of duty, whereas a trust legal title is not. In fact a trustee has really no right of ownership in the French sense because he has no right of enjoyment or disposal of the *corpus* of the trust for his own advantage. French authors are practically unanimous in considering that a division of title into "legal" and "equitable" would be contrary to French law. Dalloz indicates that a different sort of right in property than the ones indicated in the Code, if the property is situated in France, would be void.<sup>30</sup> Travers, speaking of trusts, remarks:

"It is inadmissible, for example, that French government bonds or French securities should be the object of rights unknown to French law. Public credit does not permit it. The very nature of the legal ownership which belongs to trustees involves the nullity of the trust when the properties charged, personalty or realty, are in France, without their being any occasion to inquire, in this hypothesis, whether or not the trust

<sup>26</sup> *Affaire Richaud*, (1864) DALLOZ 1.282 (Court of Cassation, Jan. 25, 1864).

<sup>27</sup> *Affaire Brousse*, (1871) DALLOZ 1.109 (Court of Cassation, May 23, 1870).

<sup>28</sup> *Affaire Caraman*, (1892) DALLOZ 1.238 (Court of Cassation, April 15, 1891).

<sup>29</sup> Art. 543: "One may have a right of ownership or simply a right of enjoyment of property, or only the right to claim land burdens thereon." See also Art. 544, cited *supra* note 3.

<sup>30</sup> DALLOZ, NOUVEAU CODE CIVIL ANNOTÉ (1900) Art. 3, No. 76.

amounts to a donation *mortis causa*, a forbidden entail or a contract concerning future inheritance, or, by its duration or effects as a restraint on alienation, violates, in other respects, French public order; the nullity would be in effect the same whatever solution were given to these problems."<sup>31</sup>

Lion has this to say:

"Besides, a trustee, as we have seen, has a right unknown to French law. What should one conclude from this fact?—The constitution of a trust by an Englishman upon property in France would be void. Nevertheless, our jurisprudence shows itself favorable to trusts. But this is because it denatures the notion [of a trust] such as we have described it."<sup>32</sup>

By reason of these principles, when French law is applied to a Common Law trust, the divided ownership rule of our law will be disregarded either wholly or in part. Hence, in the case of a Common Law trust, it is not clear in French law just what would be the respective property rights of the settlor, the trustee and the beneficiary. Especially if the settlor and beneficiary are not the same person, and the beneficiary is not a party to the trust instrument, is it highly uncertain what rights the French courts would attribute to the various parties. Under the Civil Code<sup>33</sup> a stipulation may be made in a contract for the benefit of a third person who is not a party thereto, but the stipulation must be accepted by the beneficiary and until he does so it is revocable. After acceptance the beneficiary has a right of action against the parties to enforce the stipulation in his favor.

The view that the trustee has exclusive title to the *corpus* under a trust finds support in the *Affaire Viditz*, decided by the Tribunal of the Seine,<sup>34</sup> the Court of Appeal of Paris,<sup>35</sup> and the Court of Cassation.<sup>36</sup> A British maiden lady domiciled in France made a will there in English form. A relative as next of kin contested the will. The defendant set up that the plaintiff lacked capacity to sue, because by the terms of a marriage settlement made in England everything which should be inherited by the plaintiff (an Austrian married lady who had been a British subject when the settlement was made) should fall into a trust.

<sup>31</sup> Travers, *De la validité, au point de vue du droit français, des trusts créés par des étrangers sur des biens soumis à la loi française ou par des Français sur des biens situés hors de France* (1909) REVUE DE DROIT INTERNATIONAL PRIVÉ ET DE DROIT PENAL INTERNATIONAL 521, 530.

<sup>32</sup> Lion, *Un Anglais consitue un trust, conformément à sa loi, sur des biens situés en France. La Loi française doit-elle en reconnaître la validité?* (1923) 50 CLUNET 677, 679.

<sup>33</sup> Art. 1121.

<sup>34</sup> (1895) 22 CLUNET 847 (June 28, 1895).

<sup>35</sup> (1899) 26 CLUNET 584 (Dec. 2, 1898).

<sup>36</sup> (1901) 28 CLUNET 971 (July 29, 1901).

The defendant contended that only the trustees could contest the will as any property inherited by the plaintiff belonged to the trust. The two lower courts held that the existence of the settlement did not prevent the plaintiff herself from suing to recover the property, but the Court of Cassation decided that only the trustees could do so. From this case it would seem that according to French law a beneficiary has no standing to sue a third person to recover the trust *corpus*. Furthermore, a beneficiary could not sue in the name of the trustee in view of the maxim *nul ne plaide en France par procurer, fors le Roy* (i.e. no one in France, except the King, can plead in the name of an agent). Whether or not a beneficiary could compel the trustee to sue to recover the property is still an undecided question. The *Viditz* case was remanded to the Court of Appeal for retrial where it was held that the married woman could sue because by Austrian law the British trust had been validly revoked during the marriage by contract between husband and wife.<sup>37</sup>

Circumstances exist under which a trustee has no title to the trust estate enforceable in France against the beneficiary's assignee. A case in point is the *Affaire Peel*, decided by the Tribunal of the Seine<sup>38</sup> and by the Court of Appeal of Paris.<sup>39</sup> A trust was made in England of Drayton Castle and its furnishings in favor of the fourth Baronet, Sir Robert Peel. The trustees were English and the property was situated in England. Sir Robert Peel himself took various pictures, a part of the trust estate, to Paris and sold them to a French art dealer, Kleinberger. The trustees brought suit in France to set aside the sale and recover the pictures. The defendant contended that he had acquired valid title in view of Article 2279 of the Civil Code, which provides that possession is equivalent to title with respect to personal property. The lower Court held that inalienability of trust property by a beneficiary is contrary to public policy in France, that trustees are mere agents of the beneficiary, and that a sale of the trust *corpus* by the beneficiary will not be annulled even if the purchaser had notice of the trust. The acts of the beneficiary were not considered larceny. The Court of Appeal decided in the same way, but it indicated that if the purchaser had acted negligently or in bad faith the decision would have been otherwise.

Authority exists, however, that a beneficiary has a property right in the trust estate. This is indicated by the decision in the *Affaire Terry*, of the Tribunal of the Seine.<sup>40</sup> An Amer-

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<sup>37</sup> (1904) 31 CLUNET 680 (Feb. 24, 1904).

<sup>38</sup> (1901) 28 CLUNET 812 (June 28, 1901).

<sup>39</sup> (1905) DALLOZ 2.356 (Jan. 27, 1904).

<sup>40</sup> (1895) 22 CLUNET 587 (Dec. 26, 1894).



ican, residing in Paris, made in France a deed of separate maintenance in which he agreed to pay to a trustee \$6,000 a year for the support of his wife and child. It does not appear whether or not the trustee was in France. A French creditor of the wife served a notice of attachment upon the husband, purporting to attach the right of the wife to the annual payment. The husband replied to the notice that the money was owed to the trustee, not to the wife. The Court sustained the attachment on the theory that the wife had an attachable claim against the husband and that the proceeding was valid without any notification to the trustee. It was indicated that the settlor would be entitled to deduct any amount he might have to pay the creditor from the amount which he was obligated to pay the trustee. The trustee thus seems to have been considered a mere *curateur* for the beneficiary, appointed to facilitate the payments.

Common Law trusts may also frequently conflict with the reserved rights of compulsory heirs. Thus a Common Law *inter vivos* trust is likely in some cases to violate Article 913 of the Civil Code which limits the amount that a settlor can dispose of by will or gift to the detriment of his children.<sup>41</sup> As Travers remarks, "It is evident that if the provisions made for the advantage of the beneficiary of the trust or some of them adversely affect the reserved rights recognized in certain heirs, French law, as the law governing the succession to personalty of a Frenchman who has made a trust, prevents the trust from having effect to the extent that it opposes the rights of the reserved heirs."<sup>42</sup> Consequently if a settlor has donated to a trustee in trust for a beneficiary more than he is entitled by law to give away, the trustee or beneficiary, on the death of the settlor, will be required to bring back the excess of the donation or pay the equivalent value. On the administration of the donor's estate the capital of all donations made during his lifetime will be listed as an asset and if the amount exceeds the limit fixed by law the donee will be called upon to return the excess. This will be true even when the donee has in turn parted with the property to a third person. A sub-donee will hold title to personalty free from any duty to return it, in the absence of contract to the contrary, but real estate may be followed and recovered if the first donee is insolvent. According to the same principles legacies will be reduced or will become inoperative to the extent that they exceed the portion available for testamentary disposition.

Several reported cases may be found in which Common Law trusts have been deemed subject to the reserved rights of heirs.

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<sup>41</sup> See *supra* note 6.

<sup>42</sup> Travers, *op. cit. supra* note 31.

The most notable decision is that in the Court of Appeal of Paris in the *Affaire Dieudonné*.<sup>43</sup> A French citizen made his will in France in which he left the residue of his estate to a Mr. Pratt, a British subject, "President of the International Arbitration Association in London . . . on condition that he shall employ the money for the cause of peace exclusively on the Continent." The beneficiary was a British association not recognized by French law. The successor of Mr. Pratt in the Presidency of the Association contended that the will established a trust in favor of the Association. The heirs of the testator contested the validity of the bequest by reason of Article 911 of the Civil Code, which provides that a bequest cannot operate in favor of a person who lacks capacity to take by devise by making an intermediary legatee for the person's benefit. The Tribunal of the Seine sustained the bequest, but the Court of Appeal set it aside. The decision was based upon the ground that a trust "as a purely English institution without equivalent in France cannot be deemed established by a French testator by implication or inference, and even if expressly established, it could not lawfully operate to deny to French heirs the possession of French property and to avoid, by indirect means which amount to the interposition of an intermediary, prohibitions of French law relating to public order."

Another case in which a Common Law trust was adversely regarded under Article 913 of the Civil Code is the *Affaire Sanchez*, decided by the Tribunal of the Seine.<sup>44</sup> A citizen of New York made a will in France in American form in which he named the United States Trust Company, William Nelson Cromwell and another individual residuary legatees, executors and trustees to pay the revenue of certain property in America to all his children except one son. The testator made a second will in French form, applicable only to land in Porto Rico and Brazil, in which he referred as to distribution of the land to the provisions of the first will. He made a third will in French form, applicable to real estate in France, in which he made devises in favor of all his children except the son whom he disinherited as above mentioned. The disinherited son contested these various wills. The Court held that, inasmuch as New York law referred to French law as the law of the testator's domicile governing the form of his will, the first will was void because not in one of the three forms provided by French law; that the second will could operate only to the extent of naming executors, because the first will setting forth the manner of distribution was void; that the third will could

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<sup>43</sup> (1910) 37 CLUNET 1144 (Feb. 18, 1909).

<sup>44</sup> (1911) 38 CLUNET 912 (July 13, 1910).

not deprive the son of his rights as compulsory heir and could operate only to the extent allowed by Article 913.

Likewise in the *Affaire Sohège*, decided by the Tribunal of the Seine,<sup>45</sup> a Common Law trust was sustained in part only. An American widow, formerly French, but domiciled in England, made a trust by an instrument executed in Great Britain. She did not reserve a power of revocation. The *corpus* of the trust was a large block of shares of the Singer Manufacturing Company of New Jersey. The trustees, British subjects resident in England, were to pay the revenue to the settlor for life. The settlor reserved a power of appointment by act *inter vivos* or by will, and if the power was not exercised the trustees were to pay the principal after her death to her children as they came of age. The settlor subsequently married a Frenchman, thereby becoming French, and went to live in France. Upon her death the husband sued to recover a part of the value of the securities on the theory that the trust *corpus* was a portion of his wife's succession and that he was entitled to a share thereof under the settlor's will which bequeathed to him such amount of her estate as French law declared available for testamentary disposition by a wife in favor of her surviving husband. The Tribunal rejected this claim in a first judgment on the ground that the trust was not rendered void by the change of nationality of the settlor from American to French, it having been made at a time when the settlor was American, and that it did not constitute in French law an illegal contract concerning future inheritance, a forbidden entail or a gift *mortis causa*. In a second judgment of the same date the court indicated that a part of the trust *corpus* would belong to the decedent's estate if the *corpus* should be found to exceed the amount which could be donated by the settlor under French law. The trust was considered to be a donation, and by the application of Article 922 of the Civil Code<sup>46</sup> the trust *corpus* was regarded as an asset of the succession subject to reduction if the total amount donated by decedent during her lifetime exceeded the portion lawfully available for donation by her. The same judgment decided that the trust securities did not fall within the limited community regime of marriage property under the marriage articles between the settlor and her husband. By a third judgment of the same date

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<sup>45</sup> (1910) 37 CLUNET 1229 (May 16, 1906).

<sup>46</sup> "The reduction is made by forming one mass of all the property existing at the death of the donor or testator. Such property as he has disposed of by donations *inter vivos*, according to the statement thereof at the time of the donations, and of the value at the time of the death of the donor, is fictitiously added. After having deducted the debts, a calculation is made on all this property as to what may be the portion which he could dispose of owing to the kind of heirs he leaves."

the court decreed that the husband had no right to attach the trust property in the hands of the trustees to secure his rights either as legatee or as survivor of the limited community regime stipulated in the marriage articles.

In the cases heretofore cited Common Law trusts have fared rather badly before the French Courts. It must not be thought, however, that trusts will always be disregarded in France; on the contrary they have been sustained on various grounds. If foreign and not French law applies to the trust, it will be upheld as valid unless contrary to French public policy. For instance, the Court of Appeal of Paris in the *Affaire Curdy*<sup>47</sup> sustained a testamentary trust of personalty apparently situated in France, made by a United States citizen domiciled in California, on the ground that the capacity of the settlor to dispose of personalty was determined by American law, real estate in France not being involved. The personalty seems to have been treated as being in California, the place of domicile of the decedent. The Court applied California law, but indicated that had French law applied the trust would have been void.

Common Law trusts have also been sustained by French courts, even when French internal or municipal law applies to them. These decisions have been based upon no less than three different theories: first, that a trust is a fiction and the trustees, who may be called *curateurs*, *exécuteurs*, *administrateurs*, *madataires* or *fidéi commissaires*, are merely agents or bailees of the settlor or beneficiary; second, that an *inter vivos* trust by or in favor of a wife on her marriage settles her property relations with her husband and establishes a system analagous to the French *dotal* or *separation de biens* regimes; third, that there is no legal objection to that aspect of the particular trust involved in suit. It is to be observed that a trust sustained on a theory which denatures its character is likely to have some of its purposes eventually defeated.

In the *Affaire Morrogh*,<sup>48</sup> in the Tribunal of the Seine, trustees were called "a kind of agents, who are not really owners." There a British subject domiciled in France made his will in Ireland in which he named two trustees to apply the revenues from his estate to his son for life, the principal to go to the grandchildren. The son contended that this was an unlawful *substitution*, but the court considered it simply as a *legs à charge* or *fiducie*. There was no sequence of two ownerships, as the son only received a life interest in the income and the trustees were not real owners but mere agents to carry out

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<sup>47</sup> (1884) 11 CLUNET 192 (Aug. 7, 1883).

<sup>48</sup> (1917) 44 CLUNET 1069 (Dec. 19, 1916).

the bequest in favor of the grandchildren. The same court in the *Ronger* case<sup>49</sup> treated testamentary trustees as executors.

However, in the *Affaire Roden*<sup>50</sup> a British trustee of a French patent was not considered to be an owner thereof within the meaning of French law and could not sue for infringement either in his own or the inventor's name until he secured a French notarial assignment. The trustee was regarded as a mere "licensee" or "agent." As licensee he could not sue for infringement; as agent he could not sue in his own name; and he had no authority to sue in the name of the inventor.

The analogy of trusts to one or other French matrimonial property regime has also been invoked on occasion to sustain Common Law trusts. A decision of this nature is the *Affaire Royle*, decided by the Tribunal of the Seine.<sup>51</sup> A trust was made in England by an Englishwoman before her marriage to a British subject. The trust was of personalty situated in France and the revenues were to be paid to the settlor for life. The British trustee was allowed to recover the trust property in France inasmuch as the instrument was deemed to establish a marriage regime similar to a combination of the French *dotal* and *separation de biens* regimes.

Absence of any particular objection to a trust has likewise served to sustain some Common Law trusts. This was the basis of the decision of the Tribunal of Nice in the *Affaire Mac-Calmont*.<sup>52</sup> An Englishman domiciled in Great Britain made a will in which he devised realty in France to three trustees for the benefit of the eldest son of his cousin. The widow and sisters of the testator contested the will and sued the British trustees in the French courts for the French realty. The will was sustained on the ground that no illegal *substitution* had been attempted by the trust as the trustees had no title for their own benefit and hence a sequence of two ownerships had not been created. The fact that entails could be barred in England was considered a further reason for holding the trust valid, inasmuch as a French *substitution* is irrevocable in character. This may perhaps mean that a terminable or revocable trust would avoid the rule against *substitutions*.

Common Law trusts play practically no part in French corporate business or commercial law. In French practice, mortgages for bondholders are recorded either in the name of the banker who first subscribes the issue or of a third person who purports to act as agent, *gérant d'affaires*, for the benefit of

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<sup>49</sup> (1911) 38 CLUNET 594 (Mar. 5, 1897).

<sup>50</sup> (1875) 2 CLUNET 17 (Tribunal of the Seine, May 30, 1873); (1880) 7 CLUNET 472 (Court of Appeal of Paris, Jan. 28, 1879).

<sup>51</sup> (1889) 16 CLUNET 635 (Aug. 8, 1888).

<sup>52</sup> (1911) 38 CLUNET 278 (May 3, 1905).

the future bondholders who, by their subscriptions, ratify his acts.<sup>53</sup> Such a third person does not remain a trustee, for when the bondholders come into existence they, and not the third person, are entitled to the mortgage lien, the latter thus disappearing for all practical purposes. Furthermore, French bondholders are nearly always organized into a *société* by the notarial instrument governing the bond issue. Therefore, instead of trustees, the directors of the bondholders' association represent them and bring suit against the debtor to enforce the lien. A Common Law trust appointing trustees for bondholders was sustained as valid in the *Affaire Kerr*, decided by the Court of Appeal of Toulouse<sup>54</sup> and affirmed by the Court of Cassation.<sup>55</sup> A British company, by a trust deed executed in England, named trustees for mortgage bondholders in relation to a bond issue to be marketed in France and to be secured by realty in the Republic. This deed was followed by a notarial mortgage, executed in France, to which the company and the trustees were parties. The company was declared bankrupt in France, and a French bondholder sought to sue the company in his own name, although both the trust deed and the mortgage provided that only the trustees could bring the suit to enforce the security. The Court held that the limitation of the right to sue was valid, analogizing it to similar restrictions in the articles of French bondholders' associations. It is to be observed, however, that the court rested its decision upon the French notarial mortgage and not upon the British trust deed. The trustees were called *fidéi commissaires* and were treated simply as agents of the bondholders under an agency irrevocable rather by reason of the interest of the other bondholders than by any interest of the trustees coupled with their agency.

A number of questions exist in the French law applicable to Common Law trusts which have not yet been answered by the courts. It is the purpose of some trusts to place capital assets for the advantage of a person but out of the control either of him, his creditors or his relatives. To what extent this result can be achieved in French law is problematical. For example, would property settled before marriage upon trustees for the benefit of an intended wife become community property if the couple expressly selected a community regime in their subsequent French marriage articles, or if they married and became domiciled in France without making any antenuptial contract? The answer is that sometimes the property would indeed fall into community, the trustees being considered merely agents of

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<sup>53</sup> 26 BAUDRY-LACANTINERIE AND DE LOYNES, *TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL* (1906) 781.

<sup>54</sup> (1906) 33 CLUNET 451 (July 18, 1905).

<sup>55</sup> (1912) 39 CLUNET 243 (Feb. 19, 1908).

the beneficiary. Could a creditor of the beneficiary attach property held under a spendthrift trust? Probably yes, if the beneficiary were also the settlor, but otherwise probably no. Could the trustee of what purported to be an irrevocable trust successfully resist a demand for conveyance by the beneficiary? If the settlor and beneficiary were the same person the answer is no. If they were different, the answer is uncertain. It is not clear in French law just when the trustee will be considered the agent of the settlor, when that of the beneficiary. A trustee is usually considered agent of the person whose interest he is to protect. In the case of a testamentary trust, the trustee is agent of the beneficiary; in an *inter vivos* trust which is in terms revocable the trustee would be agent of the settlor. The trustee probably could not lawfully decline to end a trust when required to do so both by the settlor and beneficiary, even if no clause for revocation were in the trust instrument.

From the foregoing study of trusts in French law certain conclusions may be drawn: a trust expressly made revocable and a trust for the settlor's benefit for life are both really in the nature of revocable powers of attorney; a trust *inter vivos* of realty or personalty in France will usually be sustained as a bailment and a testamentary trust will usually be sustained as a legacy subject to condition, but sometimes the one or the other will be void or inoperative in whole or in part; a trust of realty or personalty situated outside of France will usually be operative to the extent allowed by the foreign law, but in the case of a French settlor any restrictions upon capacity in French law will be enforced notwithstanding the terms of the trust instrument.

Thus far the position of Common Law trusts in the civil and commercial law of France has been considered. The position of such trusts in the fiscal laws of that country will also be of interest. Trust instruments are liable to taxation in France on registration, the amount of duty usually depending upon whether the trust is taxable as a donation *inter vivos*, as a transfer for valuable consideration, as a transfer by will, or as a mere power of attorney. All legal instruments are required to be registered and to pay a tax. Registration means recording an original instrument and paying stamp duty upon it. Notarial instruments executed in France are to be registered within a very brief period, *e.g.* ten days in the case of sales of realty. Private instruments (*i.e.* those not made before a notary) which are bilateral in character must, if made in France, be registered within three months from their date, and if made outside of France within six months, a year or two years, as the case may be. A shorter time is fixed for registering various other private instruments. For the regis-

tration of some private instruments made in France and all private and notarial instruments made outside of France there is no time limit. But instruments cannot be mentioned in French judgments or in legal documents until registered.<sup>56</sup> This prevents the admission of an instrument in evidence until it is registered. Registration is also enforced very effectively by Article 1328 of the Civil Code which provides that private instruments have a date against third persons only from the time of registration or of the death of a signer or of acknowledgment before a French notary or of mention in a notarial instrument. The registration tax is paid by the notary who collects the amount from the parties. The tax upon instruments which create, transfer or release rights is paid by the debtor or beneficiary.

In this connection it should be observed that an instrument acknowledged before an American notary in California has been held not to be a notarial instrument within the meaning of French law. Such an instrument is presumptive evidence of what it recites but it is susceptible of disproof and may be contested otherwise than by the special proceedings provided by French law to falsify notarial instruments.<sup>57</sup> Instruments signed and acknowledged before an American consul in France, however, would be deemed to have been executed by the signer within France and to have a fixed date as a notarial instrument.<sup>58</sup> An instrument signed and acknowledged before an American state commissioner of deeds resident in Paris would also be deemed executed by the signer in France and thus merely a private instrument, for such officials have no consular or other official standing under French law.

Taxation rates vary in France almost from year to year but the legal basis of taxation is reasonably permanent. The registration tax may be either fixed or variable, *i.e.* proportional or progressive. The fixed tax applies to all civil instruments which contain neither the terms of an obligation, nor provision for liberation, liquidation, or transfer of rights of ownership, of usufruct or of enjoyment of real or personal property. This tax is from 7.50 to 11.25 francs, depending upon the nature of the instrument. A trust for the settlor's benefit would usually be taxed as a power of attorney rather than as a transfer, the trustee being considered merely an agent. But an irrevocable trust for the benefit of a third person would involve a taxable transfer. If the trust were classified by the authorities as a

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<sup>56</sup> Law of Frimaire 22d, yr. VII, Art. 22.

<sup>57</sup> *Affaire Lathuile*, (1902) 29 CLUNET 790 (Court of Appeal of Chambéry, Dec. 18, 1901).

<sup>58</sup> *Affaire Palikao*, (1881) 8 CLUNET 435 (Tribunal of the Seine, Dec. 10, 1880).



donation the tax would be very heavy. Donations are subject to a tax of from about 2.5% to 48% of the value of the gift, depending upon the degree of blood relationship between the donor and donee. If the trust were classified as a sale for valuable consideration, the proportional tax would be considerably less. The tax upon transfers of realty is 15%, with a surtax when the value of the realty exceeds 300,000 francs; upon transfers of securities the tax is about 2%. A trust involving transfer of realty or securities on record books would probably be liable to these proportional taxes.

An inheritance tax is payable not only in the case of a testamentary trust but sometimes also in the case of a trust made *inter vivos* by a decedent whose estate is administered in France. If the decedent were both settlor and life beneficiary the *corpus* would be considered a part of the settlor's estate for inheritance tax purposes.<sup>59</sup> The trust *corpus* not taxed at the settlor's death would be subject to inheritance tax as a part of the beneficiary's estate at his death. No inheritance tax would be payable at the trustee's death, however. The inheritance tax is payable by the various heirs and legatees who are responsible *pro rata* for the amount. It is not clear just what fiscal responsibility, if any, a testamentary or other trustee would have. The notary who administers a decedent's estate is charged with the duty of seeing that the tax is paid and the administration is always conducted by a notary even when the will names an executor. Inheritance taxes in France are very high. The rate progresses from about 3% for 10,000 francs to 56.4% for values above 50,000,000 francs. The rates varies according to the relationship between the decedent and the beneficiary. For example, in 1914 when the rates were considerably lower than they are today, a 9% tax was levied on a bequest made by an Englishman to trustees charged with forming a college. In this instance a ruling was asked of the French tax authorities whether in the case of an English or American trust to be carried out in France the amount of the inheritance tax should be determined in accordance with the family relationship of the trustees or of the beneficiaries to the settlor. It was held that as trustees are not owners but merely agents of the beneficiaries, it is the family relationship of the beneficiaries to the decedent which determines the amount of estate duty.<sup>60</sup>

If litigation should arise in France in relation to a trust, the above described taxation would probably have to be paid by

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<sup>59</sup> *Ibid.*

<sup>60</sup> Question 225, *En matière de trust anglais ou américain recevant effet en France, le taux des droits de mutation par décès doit-il être calculé d'après la qualité des trustees ou celle des bénéficiaires du trust?* (1914) 41 CLUNET 1226.

the trustee or beneficiary offering the instrument in evidence before it could be considered by the court. But though a litigant is obliged for purposes of suit to register an instrument which he was not otherwise under a duty to register, he will usually recover the registration tax as additional damages if he wins the suit. The obligation of advancing the amount of the tax, however, may seriously embarrass a trustee unless he is adequately covered by the trust instrument in relation to such contingent disbursements.

A settlor would not be liable in France for payment of an income tax unless he were also a beneficiary. An individual trustee receiving revenues and paying them out again to a beneficiary would not ordinarily pay income tax thereon. The beneficiary if habitually resident in France would be liable to pay the tax on remittances from the trustee even though the revenues were received by him outside France. A beneficiary not habitually resident in France would not be called upon to pay a French income tax even on remittances derived from France or from French property. The "general income tax" does not apply to companies but an American trust company operating as trustee in France would have to pay the French tax on foreign companies owning property or doing business in the Republic, and also the tax on "business profits" derived from transactions conducted in France.

Underhill gives the following practical advice in relation to trusts of British women:

"Practitioners must, moreover, be warned that, in advising English girls of fortune who are about to marry foreigners, the trustees should be of English domicile; and, indeed, it is well to provide that none but English domiciled persons should ever be appointed new trustees. Moreover, the property should never be invested in the country of the husband's domicile; otherwise it is not improbable that the foreign courts will order it to be transferred to the husband. The reason for this is that trusts (or substitutions, as they are called) have been abolished in most foreign countries, and, as the foreign judges appear to be quite incapable of grasping our idea of dual ownership (the legal ownership of the trustee and the equitable ownership of the beneficiaries), they incontinently order the trust property (if found within their jurisdiction) to be handed over to the beneficiary for the time being entitled to the income, regarding the trustees merely as mandatories or agents for them, and not as legal owners."<sup>61</sup>

One may perhaps amplify this advice and suggest that when Americans are concerned the trustee should be an American company or citizen domiciled in America, the trust securities or

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<sup>61</sup> UNDERHILL, *THE LAW RELATING TO TRUSTS AND TRUSTEES* (7th ed. 1912) 76.

property should be kept in America, the *corpus* so far as possible should be American and not French in nature, and the trust agreement should entitle a trustee to indemnify himself from the *corpus* for any French taxation to which submission is found necessary. It would also be useful when possible to have the trust instrument executed and delivered and the transfer of the property to the trustees made outside of France. Such precautions, as Travers well points out, will not always prevent the application of French law to the trust. They will, however, to some extent minimize the chances of later complications.

The practical conclusion to be drawn from the foregoing is not that Common Law trusts should never be accepted by American trust companies in France or when French people or property is concerned, but simply that special care should be taken to see that every proposed trust in any way connected with France is drawn with French law in mind. Several of our leading trust companies having experience in France now endeavor to do this. The practice adopted by them should be generalized.